

MAR 17 2006**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****UNITED STATES OF AMERICA,****Plaintiff - Appellee,****v.****FLAVIANO BETANCOURT CRUZ,****Defendant - Appellant.****No. 05-10189****D.C. No. CR-04-00324-CRB****MEMORANDUM***

**Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding**

**Argued and Submitted February 16, 2006
San Francisco, California**

Before: REINHARDT, PAEZ, and TALLMAN, Circuit Judges.

Appellant Flaviano Betancourt Cruz (“Cruz”) appeals his conviction of being found in the United States without permission after being previously deported, in violation of 8 U.S.C. § 1326, and his subsequent sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Cruz raises three issues on appeal. First, Cruz argues that the district court erred in striking for cause, on its own motion, five veniremembers who expressed either difficulty in applying the law, or sympathy for people in Cruz's position. The district court struck the veniremembers based on their statements during the voir dire. Therefore, the district court determined that they had actual bias, which is reviewed for abuse of discretion. *See United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000). We need not determine whether the district court abused its discretion in improperly removing the five veniremembers because even if it did so, we cannot say that the dismissals "presumptively resulted in a prejudiced jury panel." *United States v. Padilla-Mendoza*, 157 F.3d 730, 734 (9th Cir. 1998). Cruz "presented no evidence that any of the jurors that found him guilty were unable or unwilling to properly perform their duties." *Id.* Accordingly, Cruz's first argument fails because he was not denied the right to an impartial jury.

Second, Cruz argues that the district court violated Rule 201 of the Federal Rules of Evidence, and therefore abused its discretion, by rejecting Cruz's request for judicial notice of the fact that court interpreters must take an oath or give an affirmation declaring that they will translate accurately ("oath requirement"). Cruz sought judicial notice of a legislative fact. Rule 201, however, only governs judicial notice of adjudicative facts. Because Rule 201 did not govern this judicial

notice request, it follows that the district court did not violate it. Moreover, even if the oath requirement was an adjudicative fact, and therefore Rule 201 applied, any error was harmless. Cruz could have developed his entrapment by estoppel defense by calling witnesses who could have testified to the relevant facts.

Finally, Cruz argues that the district court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by sentencing him to eighty-two months in prison based upon the fact of a prior aggravated felony and a prior deportation. This argument is without merit. Contrary to Cruz's argument, the Government did not have to charge Cruz's earlier conviction in the indictment. *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998). As Cruz acknowledges, *Almendarez-Torres* remains good law and controls here. *See United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000). In the indictment, the Government alleged the fact of Cruz's prior deportation as an element of the § 1326 violation. The jury's guilty verdict established beyond a reasonable doubt the fact of Cruz's prior deportation. Moreover, Cruz signed a sworn statement admitting all of the elements of a § 1326 violation, and he acknowledged at trial that he had been previously deported or removed.

AFFIRMED.